The Central Law Journal.

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CURRENT EVENTS.

THE INTERSTATE COMMERCE LAW.—It has never been the practice of this JOURNAL to publish the text of statutes enacted, either by congress or State legislatures, howsoever important they might be. In this number we make an exception by printing in full the Interstate Commerce law, recently passed by congress and signed by the president. This is one of the most important acts ever passed by congress, and no doubt it will be, for a long time, what politicians sometimes call "mighty interesting reading" for other people as well as the presidents and attorneys of railroad corporations. We have, therefore, thought it would be a convenience to our subscribers to have the full text of the law always accessible and ready for reference.

NATIONAL DIVORCE LEGISLATION. — Before us lies a small pamphlet bearing the above title, written by Judge Edmund H. Bennett, and reprinted from the new review, "*The Forum.*" The article opens with two very important questions: "Is uniformity in our divorce laws desirable? Can such uniformity be secured except by congressional legislation?"

As a solution of the first of these questions, is presented a statement of the enormous diversity which exists in the laws of the several States and Territories on this subject, the differences relating alike, to the most substantial, and vital elements of the procedure, and to the most trivial of its details. Adultery is almost everywhere a sufficient cause for divorce, and yet there is not a little diversity in the statutory definitions of that crime, as entitling the injured party to the remedy. And in various States there are diverse limitations of the period within which the petition must be filed. And the same variety appears in the statutes of the several States on the subjects of conviction of infamous crime, cruel treatment, desertion, drunkenness, and other statutory causes of divorce. On these subjects hardly any two of the States are in full accord.

And there is not even a semblance of uniformity in the rules governing the jurisdiction of divorce courts in the several States; in some actual *bona fide* residence and citizenship for a term of years is necessary to confer upon the courts jurisdiction to pronounce a decree of absolute divorce, in others a mere residence for a very short period will suffice; in still others, the residence required is quite nominal.

On the subject of the re-marriage of the guilty party there is the same utter lack of uniformity; in some States he may marry again immediately, in others after six months, or one year, or two, or three, or five. And so with respect to the property consequences of divorce. The allowance of alimony, the restoration to an innocent wife of her own property, and all other pecuniary consequences of the separation vary indefinately in the various States. Besides, all these matters, the rules of interstate comity, recognizing in one State the validity of divorces granted in another, are very far from being satisfactorily settled, and it may well happen that a man held to be duly married in one State may be regarded in another as a bigamist or an adulterer.

All these matters Judge Bennett has examined with great care, and has set out the result of his investigation with much force. The character of the divorce laws of the several States, as he depicts it, is a scandal and a shame, and he arrives without any difficulty at the manifestly correct conclusion that uniformity in our divorce laws is highly desirable. The real question, however, remains: How can that uniformity be attained? He demonstrates at some length (and very superfluously we think) that no remedy can reasonably be expected from the efforts of the American Bar Association, or from the separate action of the States, and turns to the National government as the only organization from which any remedy for these evils can ever be reasonably expected. And this can only be done by a constitutional amendment, and just here we are confronted by the grisly spectre of State Rights. The amendment that Judge Bennett suggests is "a very

little one," being the insertion of two words "and divorce" in §8 of the constitution, so that it will read: "Congress shall have power to establish uniform laws on the subjects of bankruptcies and divorce throughout the United States."

Slight as this alteration in the constitution may appear, we have no doubt that sticklers for State rights will find in it ample occasion for the "view with alarm" style of rhetoric so much affected upon occasion by politicians. Judge Bennett does not seem to have taken this probability into the account at all; he contents himself with suggesting that congress shall take measures to have collected and published "reliable statistics and useful information upon this vital subject, which may arouse the minds of the public and attract the attention of legislators to the appalling evils now existing, and the only apparent cure."

While this is all very well, we think that we can foresee an opposition to this proposal more active than the mere *vis inertiæ* of indifference and ignorance which Judge Bennett proposes to combat by the "collection and publication of reliable statistics and useful information." It is true that the proposition is for a constitutional amendment, and, therefore, the strict construction slogan is unavailable for the opponents of the proposed reform; and it is equally true that the State rights sentiment has of late years lost very much of its pristine vigor, and has dwindled to a mere shadow of its ancient stalwart self, but nevertheless it still lives, and would very probably be roused to activity by a proposition to intrust to the general government the control of so strictly and literally a domestic matter as the law of divorce. We most earnestly favor the proposal to make the divorce laws uniform throughout the United States, and in doing so to make them conformable to the standard of the purest morality and the highest and most enlightened civilization, but we are not insensible to the force and description of the opposition which the reform must needs encounter. There will probably be several real grounds of that opposition, but the ostensible ground will be the usual *quia timet* pretext. If the States give up their jurisdiction of divorce, it will be feared that the control of the whole subject of marriage will next be surrendered, then all the law of domestic relations, of education, of descents and distributions, everything will tend to centralization, and, consequently, according to these pessimists, to universal *smash*. All this is apparently absurd, but we think, nevertheless, that when we undertake to act upon Judge Bennett's proposition we will encounter more serious opposition than he seems to anticipate, and should look well to our weapons.

NOTES OF RECENT DECISIONS.

INSANE PERSON—IMPLIED CONTRACT—LIABILITY OF COMMITTEE TO PAY FOR LUNATIC'S SERVICES.—On the 22d day of November, 1886, the Supreme Court of South Carolina decided a case[1] of the first impression, with regard to the liability of the committee of a lunatic to pay for the work and labor of such lunatic.

The facts of the case were that William Ashley, who was a man of fortune, had been appointed, in 1855, the committee of his lunatic son, and had for a number of years exercised the control of him that was warranted by that office as well as by his parental relation. Upon the death of the father, the plaintiff in the action under consideration was appointed committee of the lunatic, and brought suit against the estate of William Ashley, deceased, to recover for the lunatic compensation for the services rendered by the lunatic during the time that his father was his committee. It appeared that during that period the lunatic, besides other labor, "did many things in and about the house, yard and horse lot, such as making fires, cutting and hauling wood, shucking corn, feeding and watering horses and other stock," etc., and that these services were required and enforced by his father and, of course, enured to his benefit. As these services were of value to the father, the plaintiff contended that the estate of the father was bound to pay to the estate of the lunatic son the value of those services. There was, however, evidence in the case tending to prove that the father employed the son in this manner, not for the

[1] Ashley v. Holman, 1 S. E. Rep. 13.

sake of the profit or convenience derived by him from his son's labors, but because of the beneficial effect of that employment on the son.

Upon this state of facts the court held that, although a technical contract was not possible between a lunatic and his committee, yet the latter was under a legal obligation, independent of contract, to pay for such services as were rendered him by the ward upon his requisition and for his benefit. But if these services were exacted of the lunatic for his own good as a wholesome discipline and employment for him, the committee is not bound to pay for such services, even although he may have derived an incidental benefit from them.

It is not a litttle singular that the law of implied contracts on this subject is so one-sided. There is abundant authority for the proposition that a lunatic who is *ex vi termini* incapable of making a contract can nevertheless be held liable upon an *implied* contract for necessaries, medicines, etc., but it seems that the rule will not work both ways, for it would appear that no contract will be implied in his favor against persons who have been benefitted by his labor. The obligation, if any such there may be, is, as the court says in this case, independent of contract. And as far as this case goes, and it is absolutely the only one on record which bears upon the question, the "obligation independent of contract" rests only upon a person who, as guardian or committee, has a legal right to control the actions of the lunatic, and could not be made applicable to any other person. We presume that if a stranger should find means to induce an adjudged lunatic to perform a valuable service, the law would imply a contract for payment, not between the stranger and the lunatic, but between the former and the guardian or committee of the lunatic; but there is no sort of authority tending to show that, if a stranger obtained valuable service from a lunatic incapable of contracting, and without a guardian, he could be made to pay for such service to the lunatic or his (unofficial) friends. In other words, although for certain purposes and in special cases the law will imply a contract *against* a lunatic, as far as the law has been declared by the courts, it will imply no contract in his favor.

LIABILITY OF JOINT EXECUTORS.

When there are two or more executors, questions often arise as to the liability of one for another's misappropriation of assets. There are three questions in such cases.

First, has the executor whom it is sought to charge for the other's default ever had possession of the assets in question?

Second, if he has had possession, and has delivered them over to another executor, what reason had he for doing so?

Third, if he has not had possession, did he know of the misappropriation by the other executor?

The first question is important, because if the executor has never had possession he cannot be held responsible, unless he knew of the actual misappropriation or was negligent in not knowing, or, as the principle is often stated, an executor is ordinarily responsible only for assets which he receives, and not for those which his co-executor receives; but if property of the estate comes to his possession and is then put by him into the possession of his co-executor, he becomes liable for misappropriation by the latter.[1]

It is often difficult to decide, under given circumstances, whether the executor has had such possession as to render him liable for the embezzlement of his co-executor. Thus, in the leading case of Langford v. Gascoyne, there were three executors who met the day after the testator's funeral at his home, and the widow, who, under the will, had a life estate in the real and personal estate, brought in a bag of money which she delivered to one executor who counted it, and then delivered it to another who kept it, and afterwards spent it for his own use. It was held that the executor who counted the money had, by that act, and by delivering it to the other, made himself liable to the estate.[2]

In a recent case in New York, a sum of money belonging to the estate was paid to

[1] Langford v. Gaacoyne, 11 Ves. 333; Croft v. Williams, 88 N. Y. 384; Wright v. Dugan, 15 Abb. New Cas. 107; McKim v. Aulbach, 130 Mass. 481; Knight v. Haynie, 74 Ala. 543; Edmunds v. Crenshaw, 14 Pet. 169; Wyckoff v. Van Siclen, 3 Demar. (N. Y.) 75; Young's App. 99 Pa. St. 74; Head v. Bridges, 67 Ga. 227; Adams v. Gleaves, 10 Lea (Tenn.), 367; Lacy v. Davis, 5 Redf. 301; Cocks v. Barlow, *Ib.* 406; Dixon v. Storm, *Ib.* 419; Paulding v. Sharkey, 88 N. Y. 432.

[2] Langford v. Gascoyne, 11 Ves. 333.

one executor in the presence of the other, without the latter either assenting or objecting to the payment, and it was held that the latter was not bound to supply the loss caused by the misappropriation of the money by the former, since he had never had possession of the money.[3] In another New York case, the two executors, one of whom was the widow, met in a room in the deceased's house, and the widow then brought out a box containing securities, which were appraised and inventoried, returned to the box, and then the box taken by the other executor. In this case it was held that the widow was not liable, the court holding that she had no possession of the securities.[4] But the question naturally arises. in whose possession were the securities, if not in her possession? She was living in the house after her husbands death, and it did not appear that any one else interested in the estate was living there. She had, undoubtedly, such possession of the house as would support an action of trespass against a trespasser without title, and it seems clear that she could have maintained an action of trover for the conversion of the chest of securities against one who wrongfully should have taken it away. Having such possession of the securities she was entitled to keep it as against her co-executor,[5] and having once had this possession on the general principle, it seems that she should have been held liable, unless she had some good reason for paying the money over to the co-executor. In a Massachusetts case,[6] the executors jointly released a mortgage, and sent the release to the mortgagor by an express company. The mortgagor returned the money by the same express company to one of the executors, who misappropriated it without the knowledge of the other. The court held the other not liable, and said that the general rule applied, *i. e.*. that an executor was responsible only for the assets actually received by him, and that in this case the joint release, being a merely formal act, did not amount to any such direction or authority over the money as would render him liable, and sustained the case of joint receipts by co-executors where only the one who actually receives the money is liable for it.

If, however, the executor gets possession of assets and then hands them over to another executor, the second question arises, what were his reasons for doing this, for, in some cases, where an executor, in good faith and under circumstances which make the action clearly for the benefit of the estate, delivers over assets to his co-executor, he is not liable for misappropriation by the other. Thus, in the leading case on this point,[7] one executor resided near the late residence of the deceased in Suffolk, the other having the assets resided in London. The latter paid over to the former money to be used in paying local debts of the testator, thinking that the estate would thereby be saved money. and knowing that his co-executor had been employed as attorney and general business agent by the testator. The court held that these circumstances exonerated the London executor from liability for misappropriation by the Suffolk executor. Again, in another case,[8] Lord Campbell says, that if an executor in London remits money to pay debts to his co-executor in Suffolk, "he is considered to do this of necessity; he could not transact business without trusting some person, and it would be impossible for him to discharge his duty if he is made responsible when he remitted to a person to whom he would have given credit, and would, in his own business, have remitted money in the same way." These are but instances of cases where an executor may exonerate himself, but he must make out a clear and strong case in order to bring himself within the benefit of this exception. The third question does not seem to demand special discussion, since it results from general principles of equity that, if an executor stands by and sees a co-executor misappropriate funds of the estate, both will be liable.[9]

The foregoing discussion is based upon the common law. In many of the States, statutes provide that the executors must give bond for the faithful execution of their

[3] Croft v. Williams, 88 N. Y. 388.
[4] Wright v. Dugan, 15 Abb. New Cas. 107.
[5] Langford v. Gascoyne, *supra*.
[6] McKim v. Aulbach, 130 Mass. 481.
[7] Bacon v. Bacon, 5 Ves. 331.
[8] Joy v. Campbell, 1 Sch. & Lef. 341.
[9] Booth v. Booth, 1 Beav. 125; Styles v. Guy, 1 Mac. & G. 433; Wood v. Brown, 34 N. Y. 137; Heath v. Allen, 1 A. K. Marsh, 442; Weigand's App. 28 Pa. St. 471.

duties. In that case, if the executors give a joint bond each is liable for the default of the other during the continuance of the joint executorship.[10] The death of one of two executors, however, determines the joint executorship, and the estate of the deceased executor is not liable for misappropriation occurring after the death.[11] There are also many States where the executors may, by request of the testator in the will, be exempted from giving bond, and in many States also executors may give separate and several bonds.[12] In these cases the common law rules, as stated above, are in force.[13]

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[10] Brazer v. Clark, 5 Pick. 96; Towne v. Ammidown, 20 Pick. 535; Ames v. Armstrong, 106 Mass. 18, 19; Sparhawk v. Buell, 9 Vt. 41; Boyd v. Boyd, 1 Watts, 365; Pearson v. Darrington, 32 Ala. 227; Clark v. States, 6 Gill & J. 288; Bostich v. Elliott, 3 Head, 507; Morrow v. Peyton, 8 Leigh, 54.

[11] Brazer v. Clark, 5 Pick. 96; Towne v. Ammidown, 20 Pick. 535.

[12] Ames v. Armstrong, 106 Mass. 19; Mass. St. 1874, ch. 366; Pub. Stat. ch. 143, sec. 3.

[13] McKim v. Aulbach, 130 Mass. 481.

IMPLIED WARRANTIES ON THE LETTING OF PREMISES.

There are certain well-established principles of law relating the sale of chattels and the warranties implied by the law as to their fitness for a particular purpose. If a person sees a particular chattel in a shop and buys it, trusting that it will be fit for a particular object which he has in view, he has no remedy against the vendor of the article if it turns out to be unfit for that purpose. But if the same person buys or orders a chattel for a specific purpose from a person who usually deals in such articles, the law implies that the chattel so bought is warranted fit for that particular purpose; and if it turns out not to be fit for that purpose the purchaser has a remedy against the vendor for breach of warranty. That does not seem, at first sight, to be any sufficient reason why the same principles should not apply to contracts for the sale or letting of real property, whether of land or of houses. At present, however, these principles apply only to a limited extent, and it is the object of the following observations to indicate how far and in what cases they do apply.

In Smith v. Marrable,[1] it was held that it was an implied condition in the letting of a furnished house that it is reasonably fit for habitation, and that if it be not so fit, for example, if it is greatly infested with bugs, the tenant may quit without notice. This case is generally regarded as a leading case, and is always cited when a question of implied warranty arises. It will be observed that it related to a furnished house. In the cases which immediately followed, an attempt was made to extend the principle of the decision to include land and unfurnished houses. In Sutton v. Temple,[2] the defendant had taken a demise of the eatage of some twenty-four acres of land. He entered into possession and stocked the land with beasts, but hardly had he done so when a number of his cattle died from the effects of a poisonous substance which had accidentally been spread over the field without the lessor's knowledge. The defendant thereupon removed the remainder of his cattle, quitted occupation, and refused to pay any rent. In an action to recover the rent it was held that the plaintiff was entitled to recover. Smith v. Marrable was distinguished on the ground that the demise in that case was a house and furniture. In such a case the furniture was the principal thing demised, for that was necessary to make the house fit for immediate occupation. The ordinary rule of law as to the warranty of fitness of a chattel might, therefore, be properly applied to a furnished house. But it was otherwise in the case of a demise of land. In such a case there is no implied warranty that the land is fit for the purpose for which it was taken by the tenant. In the absence of an express warranty, therefore, the tenant must pay his rent although the land may not turn out fit for occupation, or for the purpose for which it was taken. The next case, Hart v. Windsor,[3] related to an unfurnished house. There the defendant took a house and garden, but on entering into possession found the house so infested with bugs that he could not stay in it. In an action for the rent, it was held that there is no implied warranty on a lease of a house or of

[1] 11 M. & W. 5.
[2] 12 M. & W. 52.
[3] 12 M. & W. 68.

land that it is or shall be reasonably fit for habitation, occupation, or cultivation, and that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. Both in Sutton v. Temple and in Hart v. Windsor, the case of Smith v. Marrable was referred to and distinguished as relating to a house and furniture. The next case, Keates v. The Earl of Cadogan,[4] carries out the principle of Hart v. Windsor to an extreme. There it was held that there is no implied duty in the owner of a house, which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and that no action would lie against him for an omission to do so, in the absence of express warranty or active deceit. Smith v. Marrable was followed in Campbell v. Lord Wenlock.[5] In that case Cockburn, C. J., held that, upon the letting of a furnished house for present occupation, with an express condition that it is fit for occupation; if it is not so, and is at once given up on that account, the landlord cannot recover either the rent or for use and occupation. On such a contract, whether express or implied, it is a breach of the condition if the house is so infested and overrun with bugs as to render it unfit for occupation; and, as the condition applies to the whole house, it is a breach if any of the rooms are in that state. But it must appear that the nuisance existed to a serious and substantial extent, and was such as the tenant could not reasonably be expected either to endure or to extirpate. The learned judge, in his summing up, said, that it did not matter, in his opinion, whether there was an actual express contract that the house should be put into a fit state or not, for he was of opinion, as already intimated, that upon principles of law there was an implied contract that a furnished house let for present occupation should be fit for such occupation. The next case in order of time was that of Murray v. Mace,[6] decided in 1874 by the court of exchequer in Ireland. There is an action by the landlord for rent of a house, the defendant pleaded that the house, in consequence of bad and imperfect sewerage, became, through the neglect of the plaintiff, in a condition dangerous to the lives and injurious to the health of the defendant and his family, and wholly unfit for habitation; that the plaintiff had been requested to put the premises in a state fit for habitation and had refused, whereupon the defendant quitted the house. On demurrer this plea was held bad in law. The house being unfurnished, the case was governed by Hart v. Windsor, and not by Smith v. Marrable. The case of Smith v. Marrable, though followed once or twice, as we have seen, was not accepted as a final decision of the law. This may be gathered from some of the judgments in Surplice v. Farnsworth,[7] particularly that of Coltman, J., at p. 316; while in Heard v. Camblins,[8] referring to it as "the famous case upon bugs," said that it was overruled by Hart v. Windsor. But it was never actually challenged until 1877, when the question arose in the well-known case of Wilson v. Finch Hatton.[9] In that case the defendant had agreed to rent the plaintiff's furnished house for three months from the 7th of of May, but having at the beginning of the intended tenancy discovered that the house was, owing to defective drainage, unfit for habitation, refused to occupy. The plaintiffs repaired the drains, and on the 26th of May tendered the house in a wholesome condition to the defendant, who refused to occupy or to pay any rent. The plaintiffs having sued for the rent and for use and occupation, it was held that the state of the house at the beginning of the intended tenancy entitled the defendant to rescind the contract, and that he was not liable for the rent or for use and occupation. Kelly, C. B., said: "I am prepared to hold that the law as laid down in Smith v. Marrable is good and sound law, and I may add that, although some discussions may have taken place about that case, and although some doubts may have been thrown on the law as there propounded by judges of learning and eminence, still I have no hesitation in holding that it is an implied condition in the letting of a furnished house, that it shall be reasonably fit for habitation. I am, therefore, of opinion, that, both on authority of Smith v.

[4] 10 C. B. 591.
[5] 4 F. & F. 716.
[6] L. R. 8 C. L. (I.) 396.
[7] 8 S. N. R. 307.
[8] 15 L. T. (O. S.) 437.
[9] 2 E. D. 336.

Marrable, and on the general principles of law, there is an implied condition that a furnished house shall be in a good and tenantable condition, and reasonably fit for human occupation from the very day on which the tenancy is dated to begin, and that where such a house is in such a condition that there is either great discomfort or danger to health in entering and dwelling in it, then the intended tenant is entitled to repudiate the contract altogether. The only other cases decided on the subject are two *nisi prius* cases reported in the first volume of Messrs. Cababe and Ellis's useful series of *Nisi Prius* Reports. The first of these is Bird v. Lord Greville, at p. 317, decided by Field, J. The action was for rent of a furnished house, and the defense was that the house wus infected with measles at the date fixed for the commencement of the tenancy. Field, J., found as a fact that the house was not free from infection at that date, and held the defense good. The question he had to decide was, was the house in a good and tenantable condition, and reasonably fit for human occupation, from the very day on which the tenancy was dated to begin? Unless this condition was fulfilled, the defendant was not bound to take the house, and in his opinion it was not fulfilled, The other case is that of Maclean v. Currie, at p. 361, decided by Stephen, J. He held that a tenant was not justified in determining the tenancy of a furnished house, because during the term a portion of the plastering of the ceilings (which were cracked and fractured at the commencement of the tenancy) fell in one room, and the plastering of the ceilings in other rooms was unsound and liable to fall. On the letting of a furnished house the implied term that it should be fit for human habitation only applied to the condition of the premises at the commencement of the tenancy. This important limitation of the rule laid down in Smith v. Marrable should be borne in mind.

Such being the principles of law applicable to the condition of houses furnished and unfurnished, there remains to be noticed a statutory exception to the rule that there is no implied warranty on the letting of an unfurnished house that it is fit for human habitation. This exception is contained in the Housing of the Working Classes Act, 1885, 48 and 49 Vict., c. 72, section 12. That section provides as follows: In any contract, made after the passing of this act, for letting for habitation by persons of the working classes, a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. In this section the expression "letting for habitation by persons of the working classes" means the letting for habitation of a house, or part of a house, at a rent not exceeding in England the sum named as the limit for the composition of rates by section 3 of the Poor Rate Assessment and Collection Act 1869 (32 and 33 Vict. c. 41). It is only necessary to make a few observations on this statute. It applies to all houses let at or under a rent of £20 in the metropolis, £13 in Liverpool, £10 in Manchester or Birmingham, or £8 elsewhere. And although the section applies, apparently, only to the letting of houses to persons of the working classes, yet the latter part of it seems to extend its operations to the letting of any house let at or under the prescribed rent, whether the tenant belongs to the working classes or not. Again, the contract is to contain an implied condition. The effect of this provision is to enable the tenant to repudiate or to rescind the contract, not merely to give him a right of action against the lessor; and the landlord will not be entitled to recover rent or any sum for use and occupation. Further, the requirement is that the house must not be unfit for human habitation, from whatever cause that unfitness may arise. It is not confined to unfitness from sanitary defects, though the section is contained in a part of the act relating to general sanitary law. Thus, in the cases to which the section applies, the law is precisely the same as it has been held to be in the case of furnished houses of whatever value. It is only necessary to add that the section limits the condition to the state of the premises at the commencement of the tenancy. If the house afterwards becomes unfit for habitation, it affords the tenant no remedy beyond that which he formerly possessed. It will, therefore, still be necessary to provide by express agreement for such repairs as it is desired to impose on the landlord during the continuance of the tenancy.—*Justice of the Peace, Eng.*

THE INTERSTATE COMMERCE ACT.

AN ACT TO REGULATE COMMERCE.

Be it enacted by the Senate and House of Representutives of the United States in Congress Assembled: That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry in the United States or an adjacent foreign country; provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory, as aforesaid.

The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

SEC. 2. That if any common carrier, subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive, from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

SEC. 4. That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, within the terms of this act, to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that, upon application to the commission, appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

SEC. 5. That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights, as aforesaid, each day of its continuance shall be deemed a separate offense.

SEC. 6. That every common carrier, subject to the provisions of this act, shall print and keep for public inspection, schedules, showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules

printed, as aforesaid, by any such common carrier, shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

Any common carrier, subject to the provisions of this act, receiving freight in the United States, to be carried through a foreign country to any place in the United States, shall, also, in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subjected to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier, in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time, and kept for public inspection. Reductions in such published rates, fares, or charges, may be made without previous public notice; but whenever any such reduction is made, notice of the same shall immediately be publicly posted, and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

And when any such common carrier shall have established and published its rates, fares, and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive, from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such public schedule of rates, fares, and charges as may at the time be in force.

Every common carrier, subject to the provisions of this act, shall file with the commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same. Every such common carrier shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers, in relation to any traffic affected by the provisions of this act, to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs or rates, or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid, shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall, from time to time, prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, charges thus made and published.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges, as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of *mandamus* to be issued by any Circuit Court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between

ports of transhipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.

SEC. 7. That it shall be unlawful for any common carrier, subject to the provisions of this act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 9. That any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provision of this act in any district or circuit ourt of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 10. That any common carrier, subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer, or permit any act, matter, or thing so directed or required by this act to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense.

SEC. 11. That a commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five commissioners, who shall be appointed by the president, by and with the advice and consent of the senate. The commissioners first appointed under this act shall continue in the office for the term of two, three, four, five and six years, respectively, from the first day of January, Anno Domini, eighteen hundred and eighty-seven, the term of each to be designated by the president; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Any commissioner may be removed by the president for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said commissioners shall not engage in any other business, vocation or employment. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

SEC. 12. That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created, and for the purpose of this act the commission shall have

power to require the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other persons, issue an order requiring such common carrier or other persons to appear before said commission (and produce books and papers, if so ordered), and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 13. That any person, firm, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts, whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make any reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matter complained of in such manner and by such means as it shall deem proper.

Said commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 14. That, whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of the fact upon which the conclusions of the commission are based, together with its recommendations as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

SEC. 15. That if in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, either by the testimony of witnesses or other evidence, that anything has been done, or omitted to be done, in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to said common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

SEC. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse, or neglect to obey any lawful order or requirement of the commission in this act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition to the Circuit Court of the United States sit ing in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be, and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct;

and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court on such hearing or on report of any such person or persons that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order of requirement of said commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of $500 for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court to abide the ultimate decision of the court, or into the treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution in like manner as if the same had been recovered by a final degree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the commission it shall be the duty of the district attorney, under the direction of the attorney-general of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the Circuit Courts of the United States shall be deemed to be always in session.

SEC. 17. That the commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commission shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the services thereof, which shall conform, as nearly as can be, to those in use in the courts of the United States. Any party may appear before said commission and be heard, in person or by attorney. Every vote and official act of the commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said commission shall have an official seal, which shall be judicially noticed. Either of the members of the commission may administer oaths and affirmations.

SEC. 18. That each commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the salaries of judges of the courts of the United States. The commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the secretary of the interior.

The commission shall be furnished by the secretary of the interior with suitable offices and all necessary office supplies. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners, or by their employees under their orders, in making any investigation in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor, approved by the chairman of the commission and the secretary of the interior.

SEC. 19. That the principal office of the commission shall be in the city of Washington, where its general sessions shall be held; but, whenever the convenience of the public or of the parties may be promoted or delay or expense prevented

thereby, the commission may hold sessions in any part of the United States. It may, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier, subject to the provisions of this act.

SEC. 20. That the commission is hereby authorized to require annual reports from all common carriers, subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same, the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts, and the interest paid thereon; the cost and value of the carrier's propery, franchises and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss, and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements or contracts with other common carriers as the commission may require, and the said commission may, within its discretion, for the purpose of enabling it the better to carry out the provisions of this act, prescribe (if, in the opinion of the commission, it is practicable to prescribe a such uniformity and methods of keeping accounts), a period of time within which all common carriers, subject to the provisions of this act, shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. 21. That the commission shall, on or before the first day of December in each year, make a report to the secretary of the interior, which shall be by him transmitted to congress, and copies of which shall be distributed as are the other reports issued from the interior department. This report shall contain such information and *data* collected by the commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the commission may deem necessary.

SEC. 22. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs or expositions for exhibition thereat, or the issuance of mileage, excursion or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are, in addition to such remedies: provided, that no pending litigation shall in any way be affected by this act.

SEC. 23. That the sum of one hundred thousand dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending June thirtieth, Anno Domini eighteen hundred and eighty-eight, and the intervening time anterior thereto.

SEC. 24. That the provisions of sections eleven and eighteen of this act, relating to the appointment and organization of the commission herein provided for, shall take effect immediately, and the remaining provisions of this act shall take effect sixty days after its passage.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TRAVELING SALESMEN — DRUMMER'S TAX—DISCRIMINATION—REBATE.

STATE v. LONG.

Supreme Court of North Carolina, October Term, 1886.

1. *Traveling Salesmen—Drummer's Tax—Rebate.*—A statute which requires a privilege or license tax to be paid by all salesmen or drummers who go from place to place, selling goods by sample, is not repugnant to the constitution of the United States, because it allows a rebate to the amount of that tax to such traveling salesmen or drummers as have paid that tax, and whose employers have also paid the *ad valorem* tax and the purchase tax prescribed by the revenue laws of the State.

2. *Constitutional Law — Interstate Commerce — Non-Resident—Drummer's Tax — Discrimination — Rebate.*—And the exaction of the drummer's tax or license tax from traveling salesmen, selling by sample, who are non-residents of the State, or represent non-resident firms, who have not paid to the State the *ad valorem* or purchase tax, is not repugnant to the constitution of the United States, nor is the rebate, allowed to their resident competitors, a discrimination against them or their employers.

SMITH, C. J., delivered the opinion of the court:

The defendant is charged with violating section 28 of chapter 175 of the acts of 1885 entitled, "An act to raise revenue," and upon his trial the jury rendered a special verdict in these terms, and says:

That Lewis R. Long, the defendant, is a resident of the City of Baltimore, State of Maryland, and is a drummer, salesman and agent of and for Smith, Haneway & Co., a mercantile and manufacturing firm doing business in said city.

That, on the 5th day of April 1886, the defendant, being a traveling salesman, agent and drummer, as aforesaid, in the town of Salisbury and county aforesaid (Rowan), did sell, and attempt to sell to George Achenback, goods, wares and merchandise, to-wit: taking orders by wholesale with samples, not having them and there, before soliciting orders for said goods and making sales thereof, paid to the State treasurer a tax of one hundred dollars and obtained a license so to do, and not having then and there such license in his possession, contrary to said enactment, and with intent to defeat its provisions. Now, if upon the aforesaid facts it shall appear to the court that the defendant is guilty, then the jurors find him guilty; and if otherwise the court shall adjudge the defendant not guilty, the jurors find him not guitty.

The court, being of opinion that the facts contained in the special verdict do constitute a criminal offense, directed a verdict of guilty to be entered, and adjudged that he pay a fine of two hundred dollars, from which sentence the defendant appeals.

We have had occasion recently to consider the section on which the present indictment is founded and to define the class of persons intended to be taxed as drummers, a word which seems to have come into general use, in State v. Miller 93 N. C. 511, and we do not propose to renew the discussion.

While to this enactment, separately considered, no objection is made for its want of uniformity to or its inconsistency with the federal constitution, it is insisted that this conflict is brought about by a rebate authorised in section twenty-five preceding. This section imposes upon merchants and other dealers in goods, wares and merchandise, besides an *ad valorem* tax on stock, a further license tax of one tenth of one percentum on the total amount of purchases, estimated semi-annually upon the aggregate of such for the preceding six months, and contains this clause: "Dealers paying drummer's tax, prescribed in section twenty-eight of this act, shall be allowed a rebate of that amount on their purchase tax for the same time."

As merchants residing out of the State and sending their traveling agents into this State can have no rebate unless they have here a business liable to the purchase tax, it is insisted that this is a discrimination against non-resident merchants, unwarranted by the constitution of the United States, and is the same as if the drummer's tax was put upon one class and not upon the other.

There is no feature in the statute that distinguishes between resident and non-resident, itenerant salesmen or between their employees. Both must pay the same privilege tax and enjoy equal advantage under the license issued. Nor is any difference made in respect to the place or manufacture of the goods to be sold. The rebating provision applies to all who pay the purchase tax from which the deduction is to be made. The non-resident may have a stationary mercantile business in the State conducted by himself, or an agency, and he is equally entitled to the rebate upon the same tax. Under the law he stands upon the same footing, with equal right to the same exemption as the home merchant.

If the benefit does not come to him it is because he has not the tax to pay from which the reduction comes. As forcibly argued for the State, he possesses all the emunities and privileges that belong to a citizen, and such are protected by the fundamental national law against an invasion by State legislation, and no more can be claimed. In truth the disadvantage is with the resident dealer, who is compelled to pay a tax from which the principal of the non-resident drummer, or himself non-resident, is exempt. The refunding puts them more on equal ground. Certainly there is no forbidden discrimination in the legislation itself, and hence it is sought to be found in the practical operation of the law.

This is not always, however, a test of the validity of a statute. A discriminating license tax on commission merchants dealing in cotton or cane sugar raised in the northern State would operate injuriously upon those States where these articles are never raised, but this would not render the tax obnoxious to constitutional objections, since in terms the discrimination is not seen. Undoubtedly a "State," when permitted by its own constitution, may levy taxes upon professions and privileges, and when uniform in assessment and in authorised rebates the legislation cannot be deemed discriminating against citizens of other State or their property introduced for the purpose of sale when precisely the same burden rests upon our own.

The cases to which we have been referred in the argument of defendant's counsel, the Passenger Cases, 7 How. (U. S.) 283; Woodruff v. Parkam, 8 Wall. 123; Ward v. Maryland, 12 Wall. 418, are not hostile to the views expressed. The first two relate to attempts to impose taxes upon imports from foreign States and from a State in the union, which are held to interfere with the exclusive right given to congress "to regulate commerce with foreign nations and among the several State," and denying to a State the right to "levy any impost or duties on imports or exports" without the consent of congress, except in the enforcement of its inspection laws. Art. 1, §§ 8 and 9.

The Maryland enactment was declared void because it imposed a higher license tax upon agents or drummers not permanently residing in the State than upon its own residents embarking in the same business, and also discriminates against his selling, unless he paid the increased tax, "any goods, wares or merchandise, other than agricultural products and articles manufactured in that

State." Delivering the opinion, Mr. Justice Clifford, conceding the power of a State to impose taxes on all sales made within its limits, whether the goods sold are the produce of that or some other State, provided the tax is uniform, proceeds to say: "That a tax discriminating against the commodities of the citizens of the other States of the union would be inconsistent with the provisions of the federal constitution, and that law imposing such a tax would be unconstitutional and invalid."

In Machine Co. v. Gage, 100 U. S. 676, cited in the brief of counsel representing the State, Mr. Justice Swain collects and discusses numerous cases in which State legislation has been decided to invade the exclusive power vested in congress to regulate interstate commerce, by discriminating between citizens of that and of other States, or in goods of their growth and manufacture introduced into the legislating State. In this case the act whose validity was called in question imposed a tax of ten dollars, subsequently raised to fifteen, upon "all peddlers of sewing machines and selling by sample." The sewing machines charged with the tax were made in Connecticut, and the Supreme Court of Tennessee gave an authoritative construction of the act as "taxing the peddlers of such machines, without regard to the place of growth or of manufacture." Accepting this as the correct construction of the act, the court, Mr. Justice Swayne delivering the opinion, after a full review of the adjudications, declares that "the statute in question, as construed by the supreme court of the State, makes no such discrimination," (referring to a discrimination in favor of the State or of the citizens of the State which enacted the law mentioned in a preceding clause). "It applies to sewing machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State putting all such machines upon the same footing as to the tax complained of, had an unquestionable right to impose the burden."

The ruling of the recent case of Walling v. Michigan, 116 U. S. 446, indirectly recognizes the principle upon which the preceding adjudication rests in declaring void a statute of Michigan, set out in full in the case, but which in effect imposed a tax upon persons who, not residing or having their principal place of business within the State, engage there in the business of selling or soliciting the sale of intoxicating liquors, to be shipped into the State from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of intoxication liquors manufactured in the State. This is deemed a restraint upon commerce, and the obnoxious features not removed by a subsequent act imposing a greater tax upon all persons in the State engaged in manufacturing or selling such liquors therein.

The court declares this to be "a discriminating tax against persons for selling goods brought into the State from other States or countries" and to be clearly within the ruling in Welton v. Missouri, 91 U. S. 275.

No such vitiating element is to be found in our enactment, nor can we perceive wherein consists the alleged repugnancy to the federal constitution, or any discrimination unfavorable to the non-resident, or any advantage secured to the home dealer and denied to the others.

The general assembly seems to have aimed to eliminate from the revenue law the objectionable and discriminating provisions that were present in its earlier enactments, in order to conform its legislation to the requirements of the paramount law of the United States constitution, as authoritatively interpreted by its highest court.

But if such inconsistency, discoverable not in the form of the enactment but from its unequal operation, find a reasonable support in argument, which we do not concede, it is not so apparent as to warrant us in declaring it inoperative and void.

There is no error, and this will be certified for further action in the court below.

NOTE.—As the matter is stated in the principal case the drummer, whether he be resident or non-resident, is subject to a tax, and that far there is no discrimination. And he is equally taxable whether his employer or principal be resident or non-resident. Still there is no discrimination against the non-resident. But there is a discrimination when, as in North Carolina, a distinction is made between persons who have, and those who have not, paid a tax which, in the nature of things, can only be levied upon and paid by the resident dealer. The North Carolina merchant who sends out his drummer pays the *ad valorem* tax, the purchase tax, and the drummer's tax, but the latter is refunded to him because he has paid the former. The Maryland dealer who has paid to his own State all the taxes required of him by its laws, presumably equivalent to the North Carolina burdens, is, as a condition precedent to his doing any business at all in North Carolina, required to pay a tax from which his North Carolina competitor is exempt, and by the amount of that tax he is at a disadvantage in the contest in which he is engaged.

The North Carolina court seems to see this point and meets it thus: "Under the law he (the non-resident) stands upon the same footing with equal right to the same exemption as the home merchant. If the benefit does not come to him it is because he has not the tax to pay from which the redemption comes." In other words, if the Maryland man, having paid his tax in that State, will bring his goods into North Carolina and pay a *second* tax there, he will be excused from the *third* or drummer's tax, just as the North Carolina man having paid *one* tax is excused from the payment of a *second*. And this the court regards as having "equal right to the same exemption as the home merchant;" having paid *two* taxes, the non-resident would be relieved of a burden, of which the payment of *one* tax relieves the home merchant.

The court makes the further suggestion that, "if the non-resident may have a stationary mercantile business in the State, conducted by himself or an agency, he is equally entitled to a rebate upon the same tax." This amounts to very little more than the proposition that, if a citizen of another State will become a citizen of North Carolina, or even if he will bring his property

within the State and pay all the taxes that may be levied upon it, no discrimination against him will be practiced.

To us it is very manifest that the rebate allowed to the party who has paid the purchase tax *and* the drummer tax, by which he is relieved of the latter, is a discrimination in favor of the resident dealer who can, and ought to, pay the purchase tax, against the non-resident dealer, who, having been sufficiently taxed at home, could not reasonably be expected or required to pay a *second* tax in North Carolina, even if by such payment he shall escape a *third* tax.

It is hardly necessary to pursue the principal case further. It remains to show the view taken of the subject by the Supreme Court of the United States. In Welton v. Missouri[1] it was decided, reversing the Supreme Court of Missouri, that a license tax required for the sale of goods was a tax upon the goods; that the constitutional provision which vests in congress the power to regulate commerce among the States protects all articles of commerce transported from one State to another against interfering legislation by the State into which it has been carried, until it has been mingled with and become a part of the general property of the country.

In a later case, however,[2] the supreme court goes more fully into the subject saying, that a tax imposed by a statute of a State upon an occupation which necessarily discriminates against the introduction and sale of the products of another State, or against the citizens of another State, is repugnant to the constitution of the United States. In Railroad Co. v. Husen,[3] it was held that the State of Missouri could not by statute prohibit, during a specified period of the year, the introduction into that State of Texas cattle, unless for sanitary reasons, and in the exercise of legitimate police power, the court saying, that the State can no more prohibit or regulate that (commerce) "which is interstate than it can that which is with foreign nations." This view is reiterated in a later case[4], in which all the cases bearing upon the subject are cited and collected.[5]

In these numerous cases every form of the question is very thoroughly considered by the Supreme Court of the United States, and it would seem that their rulings ought to include directly or by necessary implication every phase in which the question could possibly be presented.

One of the earliest of these cases,[6] decided in 1824, gives the key-note to the whole line of subsequent decisions. The point settled was that a State cannot, by granting a privilege to its own citizens, exclude from its enjoyment citizens of other States. The grant by New York to Fulton and Livingston of the exclusive right to navigate the waters of the State with steamboats could not be sustained against the clause of the constitution which conferred upon congress the power to regulate commerce among the States. A State cannot levy a tax upon persons going out of, or passing through, it by the ordinary modes of travel.[7] This ruling secures the first essential of commercial intercourse, the right of citizens of the several States to enter and traverse at pleasure any other State upon equal terms with the citizens of such other State, and the same principle which secures equality of right in this respect secures it also in every other.

Numerous efforts have been made to evade the operation of that clause of the constitution of the United States which declares, that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." In one case,[8] a discrimination without subterfuge or evasion was made by the State, and was promptly declared void by the Supreme Court of the United States. In the same State, which seems to have been a trifle persistent in this matter, an attempt was made to impose a tax upon the products of other States more onerous than the tax imposed upon domestics products of the same description. The attempt failed, of course.[9] In another case in the same volume,[10] the court makes the following remark which, in our judgment, covers the whole subject: "In all cases of this class, to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State, or of the citizens of the State, which enacted the law. Wherever there is such discrimination it is fatal."

And to this we can merely add that, howsoever cunningly devised an enactment or ordinance may be, and whatever semblance of fairness and justice it may bear upon its face, if its operation and effect is to place the citizens of another State at a practical disadvantage or in an unfavorable position as compared with the denizen, in the prosecution of the same or similar pursuits, it will fall within the prohibition of the constitution, and whenever a proper case shall be presented, it will be declared void by the Supreme Court of the United States.—[ED. CENT. L. J.]

1 91 U. S. 275.
2 Walling v. Michigan, 10 U. S. 446.
3 95 U. S. 465.
4 Brown v. Houston, 114 U. S. 622.
5 See Gibbons v. Ogden, 9 Wheat. 1; License Cases, 5 How. 504; Passenger Cases, 7 How. 282; Crandall v. Nevada, 6 Wall. 35, 49; Paul v. Virginia, 8 Wall. 168; Ward v. Maryland, 12 Wall. 418, 431; State Tax on Railway Receipts, 15 Wall. 284; The Lottawanaa, 21 Wall. 558, 581; Henderson v. Mayor of New York, 92 U. S. 259; Sherlock v. Alling, 93 U. S. 99; Railroad Co. v. Husen, 95 U. S. 465; Cook v. Penn, 97 U. S. 566; Guy v. Baltimore, 100 U. S. 434; Tiernan v. Rinker, 102 U. S. 123; Packett Co. v. Callettsburg, 105 U. S. 559; Transportation Co. v. Parkersburg, 107 U. S. 691, 701; Moran v. New Orleans, 112 U. S. 69.
6 Gibbons v. Ogden, 9 Wheat. 1.
7 Crandall v. Nevada, 6 Wall. 35. See also Passenger Cases, 7 How. 283.
8 Ward v. Maryland, 12 Wall. 418.
9 Guy v. Baltimore, 100 U. S. 434.
10 Machine Co. v. Gage, 100 U. S. 676.

WEEKLY DIGEST OF RECENT CASES.

1. ATTORNEY AND CLIENT—*Evidence—Privileged Communications.* — Facts which come to the knowledge of counsel in the course of his professional employment are privileged, and may not be proved by the testimony of such counsel without the consent of the client.—*Kaut v. Kessler*, S. C. Penn., Jan. 3, 1887; 19 Weekly Notes of Cases, 85.

2. BANKS AND BANKING—*Collections—Bank Liable for Agent's Default.*—Where a bank accepts a draft from a customer for collection, without any special contract as to its liability, and transmits it for collection to an agent, who collects it and fails to account for the proceeds, the bank is liable to its customer for the amount collected on such draft. —*Power v. First Nat. Bank of Fort Benton*, S. C. Mont., Jan. 5, 1887; 12 Pac. Rep. 597.

3. CARRIERS—*Of Passengeers—Palace Car Company—Loss of Valuables—Contributory Negligence.*—The plaintiff, who had purchased a ticket to ride in a day parlor car of the Pullman Palace Car Company, had in her possession, and kept under her own personal control, a satchel containing valuables; and, on reaching a station on the railroad on which the car was run, she, with her husband, left the car, for a period of several minutes, leaving the satchel upon the window-sill in the car, from which place it was stolen. *Held*, that the plaintiff was guilty of negligence in the care of her property, and that the car company was not liable, *Whitney v. Pullman, etc. Co.*, S. J. C. Mass., Jan. 6, 1887; 9 N. E. Rep. 619.

4. CONFLICT OF LAWS—*Sale—Conditional—Validity in—New Jersey—Fraud—Invalid in Pennsylvania as Against Creditors and Bona Fide Purchasers—Conflict of Laws.*—By the law of New Jersey, upon a conditional sale of chattels, followed by delivery of possession to the vendor, the reservation of title in the vendor until the contract price is paid is valid, as against creditors of, and *bona fide* purchasers from, the vendee, unless the vendor has conferred upon the vendee *indicia* of title beyond mere possession, or has forfeited his rights by conduct which the law regards as fraudulent. By the law of Pennsylvania, the reservation of title in the vendor upon such a conditional sale is valid as between the parties, but is invalid as against creditors of the vendee, or *bona fide* purchasers from him. S purchased of the M S Company a safe, on credit, under a contract that the safe was to be the property of the company until the contract price was paid. The purchase was made at the company's office in Philadelphia, and the safe was delivered there to a carrier, to be transferred to Highstown, in this State, where S resided. Subsequently S sold the safe to N, and delivered possession to him. The safe was then at Highstown, and the sale and delivery to N were made at that place. N was a *bona fide* purchaser, and paid his purchase money without knowledge of the contract between S and the company. In trover by the company against N for the safe, *held*, (1) that the contract of purchase by N having been made in this State, the legal effect of his contract of purchase, and his rights under it, were determined by the law of this State; (2) that N by his purchase acquired only such title as his vendor had when the property was brought into this State, and became subject to the laws of this State, and that, therefore, the title in the safe was in the company.—*Marvin Safe Co. v. Norton*, S. C. N. J., Nov. 29, 1886; 7 Atl. Rep. 418.

5. CONSTITUTIONAL LAW—*Enactment of Statute—Legislative Journal Conclusive Evidence of Regularity of Proceedings—Counties—Township—Organization—Contravening Legislative Organization.*—The journals of the houses of the legislature of Michigan are conclusive evidence of their proceedings, which cannot be disputed or overthrown by parol testimony; and, on the hearing of an information alleging that the proceedings by which a bill was passed for the organization of a township were unconstitutional, the courts will not listen to stipulations or admissions by pleadings that the act was not properly or constitutionally passed, unless the informality is shown by the printed journals or the certificate of the secretary of state. Where, since the passage of an act organizing a township, the supervisors of the county out of which the township was formed have undertaken to form two other townships out of that organized by the legislature, without seeking a bill, and, on a petition not appearing on its face to be signed by any freeholders of the township organized by the legislature, their action cannot stand in the way of the legislative organization, or interfere with the rights of an officer duly elected for such township.—*Attorney-General v. Rice*, S. C. Mich., Jan. 20, 1887; 31 N. W. Rep. 203.

6. CORPORATIONS—*Insolvency—Receivers—Counsel Fees of Petitioning Stockholders—Counsel Fees of Receiver—Reference to Tax Fees—Notice—Appeal — What the Court Will Consider — The "Case."*—A claim for professional service, resting, as it does, upon contract, cannot be made a charge against persons other than the client, by the simple fact that the services have inured to their benefit; and the attorneys of a minority of the stockholders of an insolvent corporation, who have filed a bill for injunction, receiver, and sale, charging fraud and confederacy on the part of the defendants, are not entitled to have their fees allowed out of the proceeds of sale made by the receiver appointed under the bill, and the fact that the defendants consented to the receivership does not make the plaintiff's attorney their counsel. In such a case, the corporation being a necessary party to the action, it had the right, through the receiver, to employ counsel, and the fees of attorneys so employed should be paid out of the fund. On a reference to ascertain the amount of such fees, the parties interested in the fund have a right to be heard, both by evidence and argument, and a notice of such a reference is necessary; overruling Nimmons v. Stewart, 13 S. C. 445, as to this point. The Supreme Court of South Carolina will not accept any fact, unless it appears in the "case," as prepared for argument before it; and facts incorporated in the exceptions or in the argument, which do not appear in the "case," will be disregarded, unless admitted by the other side.—*Hubbard v. Camperdown Mills*, S. C. S. Car., Nov. 22, 1886; 1 S. E. Rep. 5.

7. ——— *Organization—Validity.*—The existence of a corporation, organized under the general laws of the State, dates from the time of filing its charter, and it is not prerequisite that all the capital stock of the corporation be subscribed for it to transact business.—*Chicago, etc. Co. v. Putnam*, S. C. Kan., Jan. 7, 1887; 12 Pac. Rep. 593.

8. COUNTY — *Subscription for Stock — County Bonds—Evidence*—It is competent, after by a popular vote, a county has authorized a subscription for stock in a railroad company, and the issuance of bonds therefor, to prove by parol evidence that the county commissioners authorized the subscription for stock, by the county clerk.—*Chicago, etc. Co. v. Putnam*, S. C. Kan., Jan. 7, 1887; 12 Pac. Rep. 593.

9. CRIMINAL LAW —*Doubt — Reasonable Doubt — Weight of Evidence—How Jurors Should Act.*— In the trial of an indictment for larceny, the court instructed the jury "that no mere weight of evidence will warrant a conviction, unless it be so strong and satisfactory as to remove from your minds all reasonable doubt of the guilt of the accused. * * * You are not to go beyond the evidence to hunt for doubts; nor should you entertain such doubts as are merely chimerical, or are based upon groundless conjecture. A doubt to justify an acquittal must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case, and then it must be such a doubt as would cause a reasonable, prudent and considerate man to hesitate and pause before acting in the grave and more important affairs of life. If, after a careful and impartial consideration of all the evidence, you can say and feel that you have a firm and abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge to a moral certainty, then you are satisfied beyond a reasonable doubt." *Held*, that the instruction was proper. In response to a question by the jury, who returned into court for further instruction, after the cause had been submitted, the court instructed them that "jurors are not artificial beings, governed by artificial rules; but they should bring to the consideration of the evidence before them their every-day common sense and judgment, as reasonable men; and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from facts and circumstances proven in the case, you should draw and act on as jurors." *Held*, not error.—*State v. Elsham*, S. C. Iowa, Dec. 22, 1886; 31 N. W. Rep. 66.

10. —— *Evidence—Expert Testimony—Hypothetical Questions—Res Gestæ—Statements of Wife of Accused—Admitted on Wrong Ground—Cured by Charge—Circumstantial Evidence—Effect of.*— Questions asked a medical expert, based on a hypothetical state of facts, such as the prosecution assumed to have proved, relative to the condition of the body of the deceased when found, and as shown at the autopsy had some days afterwards, are properly admitted, notwithstanding accused's objections to the manner of taking the autopsy, and that the hypothetical case did not state the facts as proven; the jury having been instructed that they were not to consider the expert testimony, unless they first found the facts on which it was based to be true. On the trial of an indictment for murder, testimony showing the statements of the wife of the accused, made in the presence of accused immediately after the death of deceased was discovered, at the house where it occurred, and testimony of such statements necessary to explain statements of the accused, are properly admitted as part of the *res gestæ*. Where the court, in its instructions to the jury, points out how certain evidence is to be considered, there is no error, although the purposes for which the prosecution announced it was introduced are not the true ground for its admission. To warrant a conviction on evidence purely circumstantial, the prosecution must show that there is no theory of innocence possible which will, without violation of reason, accord with the facts proven in the case.—*People v. Foley*, S. C. Mich., Jan. 14, 1887; 31 N. W. Rep. 95.

11. —— *Homicide—Excusable Homicide—Provocation by Accused—Charge to Jury—Opportunity to Escape.*—Where, in the trial of an indictment for murder, the court instructed the jury that, if they believed from the evidence that the defendant provoked the difficulty, then it should mak no difference as to what threats were made by the deceased, if he made any, or what his character may have been for violence, or what may have been the danger to the defendant at the time he fired the shots, the law will not excuse him for the homicide. *Held*, that the instruction was correct. In the trial of an indictment for murder, the refusal of the court to instruct the jury: "In determining whether defendant had a reasonable and safe opportunity to run from deceased, it is competent for the jury to consider the fact, if proven, that deceased was between defendant and his house"—is not erroneous.—*Jackson v. State*, S. C. Ala., Jan. 7, 1887; 1 So. Rep. 33.

12. —— *Indictment—Statement of Grand Jurors to Each Other.*—A defendant was indicted under the Alabama statute for selling liquor to R, a person of known intemperate habits. There was evidence before the grand jury that liquor was sold to him, but none, except the statement of jurors to each other, that R was of known intemperate habits. A motion to quash the indictment, because not founded on legal evidence, being denied, an application for a *mandamus* was made to the supreme court so compel the judge of the court below to strike the indictment from the file, etc. *Held*, without deciding whether *mandamus* would lie, that the ruling of the lower court should be affirmed, following Washington v. State, 63 Ala. 189, and Sparrenberger v. State, 53 Ala. 481.—*Jones v. State*, 53 Ala. 481; 1 So. Rep. 32.

13. —— *Larceny — Unlawful Moving of Animal with Intent to Kill It on Owner's Premises.*—It is not necessary, to constitute larceny, that the taking should be *lucri causa;* and a man who takes a jack from the stable of his owner, but not outside of said owner's lot, with the intent of killing the animal, is guilty of larceny.—*Deik v. State*, S. C. Miss., Nov. 15, 1886; 1 So. Rep. 9.

14. *Homicide—Murder—Malice—Wound Not Fatal —Subsequent Neglect and Mismanagement.*— The fact that death ensues from a wound, given in malice, not in its nature fatal, but which, being neglected or mismanaged, caused death, will not excuse the party who gave it; but he will be held guilty of murder, unless it clearly appear that the deceased's own neglect and want of care, and not the wound itself, was the sole cause of his death. McBeth v. State, 50 Miss. 81, overruled.—*Crum v. State*, S. C. Miss., Nov. 8, 1886; 1 So. Eep. 1.

15. DEED —*Condition Precedent — State Lands — Extension of Time—Effect—Real Action—Title of*

Plaintiff.—A deed from the State land agent, under act of 1832, ch. 30, and containing a stipulation that, when the purchase money is paid, "then this is to be a good and sufficient deed to convey said lots, otherwise to be null and void, and said lots to be and remain the property of said State," does not convey the legal title to the grantee, but such title remains in the State till payment. Nor does an extension of the time of payment operate to pass the legal title. A grantee, under a deed providing that, when the purchase money is paid, the deed shall be a good and sufficient deed, and that the title shall remain in the grantor until the purchase money is so paid, before payment of purchase money, cannot maintain a real action against a subsequent grantee from the State.—*Stratton v. Cole*, S. J. C. Me., Jan. 8, 1887; 7 Atl. Rep. 472.

16. —— *Covenant — Parol Agreement — Incumbrance.* — 1. When an oral agreement, a few days before execution of the deed, was entered into, to the effect that, in consideration that the defendant would execute and deliver the deed in question to the plaintiff, and would execute and deliver to the brother a deed of the adjoining premises, the plaintiff would assume and pay all assessments which should be made on the lands conveyed by such deeds, the consideration moving from the defendant was a promise to execute them, and not the execution of them. Where the oral contract was made before the covenant against incumbrances in the deed, the parties expressed by their conduct *in pais* that the deed should have a less operation, which is plainly a contradiction of the covenant, and cannot be allowed to take the incumbrance out of the language of the deed. A covenant in a deed against incumbrances would exclude proof of a contemporaneous oral undertaking of a larger scope, upon the same consideration, and to add a further obligation to those assumed by the convenantor; but it is otherwise where the attempt is to cut the latter down.—*Flynn v. Bourneuf*, S. J. C. Mass., Jan. 7, 1887; 3 N. Eng. Rep. 343.

17. EJECTMENT.—*Evidence—Commissioner's Deed—What Part of Record must Accompany — Two Suits Heard Together — Papers in One Lost — Parties—Taxation—Sale to State—Redemption—Constitutional Law—Acts W. Va. 1882, ch. 95, §14—Commissioner's Sale on Contract to Convey—Deed.*—Where a deed, made under a decree by a commissioner or other authority, is offered in evidence as a connecting link of the party's chain of title to land, it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the persons having the legal title to the land conveyed were parties to the suit, and as will identify the land. Where two suits are heard together, and it appears from the orders and decrees entered therein that the proper parties were before the court, either in one or both of the suits, and it is proven that the file of papers in one of the suits is lost, such orders and decrees may be read in evidence, although it does not appear from the bill in the other suit that all such persons were parties to it. The fourteenth section of chapter 95, Acts W. Va. 1882, authorizing the former owner of land, the title to which has been forfeited to and remains in the State, to redeem such land at any time before sale by the commissioner of school lands in the manner prescribed by said act, is valid and constitutional. In an action of ejectment the plaintiff offered in evidence a deed, made by a commissioner in pursuance of a decree entered in a suit brought for the specific execution of a written contract for the sale of the land so conveyed, and such portions of the record as show the authority of the commissioner to make such deed, including the said written contract. *Held*, it is not necessary in such action of ejectment to prove the execution of such contract by the vendor of the land.—*Waggoner v. Wolf*, S. C. App. W. Va. Nov. 20, 1886; 1 S. E. Rep. 25.

18. EQUITY.—*Creditors' Bill—Statutory Provisions for Garnishment no Bar to Relief.*—Where a judgment creditor has exhausted his remedy at law by execution, and return of *nulla bona*, equity will assist him to reach the effects of his debtor fraudulently transferred, and will not remit him to a statutory remedy at law by garnishment.—*Vicksburg, etc. Co. v. Phillips*, S. C. Miss. 1 So. Rep. 7.

19. ESTOPPEL.—*By Judgment—Pleading.*—A judgment in a former action between the same parties determining a point essential to the finding of that judgment, though not necessarily the precise point in issue in that action, is conclusive on the party to the second action, basing his right to recover on the matters decided adversely to his claim in the former action; and such judgment is conclusive when offered in evidence, though not pleaded in estoppel. Where, therefore, in an action to recover for money loaned, and for royalties on a patent, the record of an equity suit between the same parties, in which the same matters were set up in a petition to restrain the defendant from foreclosing a mortgage assigned to her by the plaintiff, and determined against the plaintiff, is introduced in evidence in the second action, it is conclusive on the plaintiff.—*Trayhern v. Colburn.* Md. Ct. App. Dec. 17, 1886; 7 Atl. Rep. 459.

20. HUSBAND AND WIFE. — *Divorce — Husband's Fraudulent Conveyance—Estoppel—Vendor Disparaging Title after Sale.* — Where a husband abandoned his wife, and shortly afterwards sold the house in which they had lived, and in which she was still living, to his cousin, at the same time agreeing to rent it of the cousin by the month, and, upon failure to pay the rent, to surrender possession without demand or notice, and the rent not being paid for the first month, the wife was put out under a forcible detainer, without having any knowledge of the previous sale or lease, *held*, the whole transaction was fraudulent as to her, and the husband was to be considered as still the owner of the house in allotting her alimony. Vendor cannot, after the sale, disparage his vendee's title, by declaring the sale was a sham, and made to defraud his (vendor's) wife of her marital rights.—*Johnson v. Johnson*, Court of App. Ky. Jan. 8, 1886; 2 S. W. Rep. 487.

21. INSURANCE. — *Fire insurance — Change of Interest—Sale and Assignment to Copartner—Attestation of Assignment by Agent—Other Insurance.*—The sale or transfer by one partner of his interest in a stock of goods covered by a fire insurance policy, to his copartner, is not a breach of a condition in the policy, rendering it void on a transfer of the goods or of the policy being made without the consent of the association issuing the

policy being indorsed thereon. The written attestation of the assignment of a policy, indorsed on the policy by the agent of the association issuing it, with knowledge of the sale of the goods covered by it, is a sufficient compliance with a condition in the policy to the effect that an assignment of the goods or of the policy, without the consent of the association indorsed upon the policy, would render it void. A condition of a fire insurance policy limiting and requiring consent to concurrent insurance is not violated by the cancellation of a concurrent policy subsequently to the issue of the policy in question, and the issuance by another company of a new policy for the exact amount of the canceled policy, making the total insurance the same as when the policy was issued.—*New Orleans Ins. Ass'n v. Holberg*, S. C. Miss. Nov. 8, 1886; 1 So. Rep. 5.

22. —— *Life Insurance—Forfeiture—Death While in Violation of Law—Robber Killed While Escaping—Appeal—Stipulation of Counsel as to Amount of Judgment.*—One G., who had a certificate of insurance on his life in favor of his wife, with an accomplice went into the treasury department of the State, in the day time, and demanded money belonging to the State, and was given $500. He then left the department, and had nearly reached the outer door of the capitol, when a policeman previously placed in the passage-way, but in the rear, commanded him to halt, and at the same instant fired and killed G. The certificate of insurance above referred to contained a provision that if the insured should "die while violating any law," etc., all rights under the certificate should be forfeited. *Held*, that as G. had obtained the money, and was endeavoring to escape when he was killed, that he was not, at the instant of death, violating any law, and there was no forfeiture of the certificate. Where the parties, in effect, stipulate that, in case a recovery can be had on a certificate of insurance, the amount will be $700, and the court so finds, the finding will not be disturbed.—*Griffin v. Western Mut. Benev. Ass'n.*, S. C. Neb. Jan. 6, 1887; 31 N. W. Rep. 122.

23. —— —— *Insurable Interest—Sale of Policy—Fraud—Return of Policy Canceled—Public Policy.*—A person who has no insurable interest in another's life cannot recover upon an insurance policy on such life, which is purchased during the life-time of the insured, as a policy so obtained is a mere wager, and void. The sale and transfer of a policy of insurance by the beneficiaries thereof, during the life of the insured, to one who has no insurable interest in the life of the insured, either as a relative or as a creditor, is a fraud upon the insurance company by which it was issued. Where the beneficiaries of a policy of insurance, for a valuable consideration, sell, transfer, and assign the policy to a person who has no insurable interest in the life of the insured, and such person retains possession of the policy until after the death of the insured, and, after serving proof of death, ascertains the policy cannot be collected in his hands, returns the same to the beneficiaries, with the word "canceled" written across the face of the assignment, the transaction between the beneficiaries and the assignee is against public policy, and not to be tolerated by law. Therefore the policy is worthless and void, not only in the hands of the person having no insurable interest in the life of the insured, but also in the hands of the beneficiaries and their assignee.—*Missouri Valley Life Ins. Co. v. McCrum*, S. C. Kan., Jan. 7, 1887; 12 Pac. Rep. 517.

24. —— —— *Mutual Benefit Company—Forfeiture for Failure to Pay Dues.*—Where the charter of a mutual benefit insurance company provides that the board of directors may appoint a committee to make assessments, and that a member in default for thirty days forfeits his membership, *held*, before an assessment is due or forfeiture can occur, it must affirmatively appear that the assessment was legally made, viz., by the board or by the committee appointed by the board; and an allegation by the company that the assessment was "only made" is not sufficient.—*American, etc. Co. v. Helburn*, Ct. App. Ky., Jan. 8, 1887; 2 S. W. Rep. 495.

25. JUDGMENT—*Assignment—Compromise—Partition—Equitable Assignment—Paying the Debt of Another to Protect Future Interest—Improvements—Rents and Profits.*—Where a judgment creditor agreed with his debtor to reduce his judgment a certain sum, and received it, and afterwards assigned the judgment in general terms to B, he could only convey by the assignment such interest as he then had in it, and, in a suit for a partition of the debtor's estate, B, as assignee, could only set up the balance on the judgment after it was thus reduced, and not the amount of the entire judgment. Where any person having a future interest in property on which there is a judgment lien, for the purpose of protecting such interest pays the debt of the judgment debtor, he thereby becomes an equitable assignee of the judgment, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit. Where one of several co-tenants has made improvements which add to the value of the common property, and at the same time is chargeable with rents and profits, equity requires that the rents and profits shall be regarded as paid and discharged *pro tanto*, by the increased value which may have been imparted to the premises by the improvements, and the same equity should be enforced where there is no actual partition, but the land is sold for a division of the proceeds among them.—*Sutton v. Sutton*, S. C. S. Car., Nov. 29, 1886; 1 S. E. Rep. 19.

26. —— *Scire Facias—Nul Tiel Record—Assignment of Suit by Attorney—Attorney and Counsel—Power to Assign Suit.*—In *scire facias* upon a judgment, to which a plea of *nul tiel record* has been filed, the judgment debtor cannot object to the admissibility in evidence of the original record on the ground that the attorney of the judgment creditor could not, pending that suit, enter the suit or judgment to the use of a third party. In the absence of proof to the contrary, it will be presumed that an entry of a suit or judgment by the plaintiff's attorney to the use of a third party was made at the direction and by the authority of the plaintiff.—*Hager v. Cochran*, Md. C. App. Dec. 18, 1886; 7. Atl. Rep. 462.

27. LEASE—*The Expectancy or Opportunity of Renewing Term Regarded as Property—Partnership—Partner Cannot Renew a Firm Lease For His Own Individual Advantage Before or After the Dissolution of the Firm.*—A tenant's right of

renewal of a lease, although not enforceable against the will of the landlord, is a property or asset incident to an existing lease. Where a firm is tenant this right is a partnership asset. And hence, if one partner secures a renewal of the term in his own name, he will not be allowed to enjoy it to the exclusion of his co-partner's interest. The same rule is applicable to a case where the renewal was obtained after the dissolution of the firm. Dissolution does not annul or change those relations which are the basis of the obligation between the parties; the leases remain partnership property for purposes of liquidation, and the obligation of each partner to deal with them not for his own benefit but for the joint interest continues. Where one of two co-partners, without the consent of the other, obtained, after dissolution, a renewal of the lease of the premises with the firm had occupied for himself, his co-partner may compel him to account for the value of such renewal. Such value is to be determined by the master as an expectancy only, and not as a certainty.—*Johnson's Appeal*, S. C. Penn., Jan. 31, 1887; 19 Weekly Notes of Cases, 98.

28 MALICIOUS PROSECUTION—*Malice—Immaterial Testimony—Bona Fides—No Defense—Probable Cause—Instruction on.*—In an action for damages for malicious prosecution, testimony of defendant as to a conversation by him with the prosecuting attorney and a justice of the peace as to a previous prosecution of plaintiff for a similar offense, which was settled by her paying the costs, testimony of a third person as to her seeing plaintiff picking the berries, for theft of which the prosecution complained of was brought, and testimony of a witness as to a conversation with another third party about plaintiff's having been seen picking berries in defendant's field, is all immaterial and inadmissible on the question of malice. In an action for malicious prosecution, an instruction asked in behalf of defendant, that if defendant acted in good faith, and from honest motives, that would be a defense, even if plaintiff were innocent, and there was no probable cause for the complaint, is rightly refused. On the trial for an action for malicious prosecution the court errs when, in charging the jury as to what is probable cause, and when it would be a defense to such an action, it omits to instruct them as to the rule of law to be applied in case they should believe the testimony of plaintiff on the one hand, or defendant on the other, as to the acts charged against the one, or the information on which such charge was brought by the other.—*Wilson v. Bowen*, S. C. Mich., Jan. 6, 1887; 31 N. W. Rep. 81.

29. MORTGAGE—*Absolute Deed—Equity—Reformation—Proof—Vendor and Vendee—Notice—Deed Absolute on Its Face—Tenant in Possession.*—To convert a deed absolute on its face into a mortgage the evidence must be clear, precise, and indubitable. One who purchases property for value from a person holding by a deed absolute on its face, without notice that such deed is in fact a mortgage, has a good title as against the person claiming to redeem the property. The mere fact that a person other than the vendor is in possession of the property is not sufficient to charge the purchaser with notice, if possession is delivered to the purchaser by that person on demand.—*Pancake v. Cauffman*, S. C. Penn., Oct. 4, 1886; 7 Atl. Rep. 67.

30. —— *Defense of Usury—Right of Terre-Tenant to Interpose.*—The defense of usury to a mortgage is a right personal to the mortgagor, and cannot be exercised by the terre-tenants of the mortgaged premises. The terre-tenants of mortgaged premises defended the mortgage upon the ground that the mortgage included usurious interest, and that the mortgagor, for a valuable consideration, agreed to defend against the mortgage to the extent of the usurious excess, and, notwithstanding he subsequently refused to do so, the terre-tenants, as *quasi* assignees of the right given by the statute to the debtor himself, might, for him and in his name, make the defense. *Held*, that to permit the terre-tenants to thus interpose the defense of usury, without the consent and against the will of the debtor, would be tantamount to decreeing specific performance of his agreement to defend against the usury, which the court would not do, as, being a contract relating to personal chattels, it was not enforceable specifically in equity.—*Slayton v. Riddle*, S. C. Penn., Nov. 1, 1886; 7 Atl. Rep. 72.

31. —— *Foreclosure—Sale—Husband and Wife—Right to Proceeds.*—Where A, and B, his wife, were each seized in fee of one undivided half of certain premises, and A gave to C a mortgage of the premises to secure the payment of money advanced for improvements on the same, with a covenant that he was seized in fee of the whole estate, B joining to release dower, and all the parties intending to mortgage the whole estate, and, when the facts were discovered, B gave to C a quitclaim deed of her half interest, taking from C an instrument of defeasance which provided that, in case of sale, if half the proceeds was sufficient to pay A's indebtedness to C, half the proceeds should be paid to B, and if half was not sufficient B should receive the balance, B is entitled, in case of sale, to the share of the proceeds provided by the contract, and her rights are not affected by a sheriff's sale of all the right in equity which A had in the mortgaged premises, although her contract of defeasance was not recorded.—*Union Saving Bank v. Pool*, S. J. C. Mass., Jan. 5, 1887; 9 N. E. Rep. 547.

32. —— —— *Time of Redemption — Injunction — Damages.* — Where an injunction suspends the operation of a decree of foreclosure the time of redemption does not run pending the injunction; and in such case the mortgagee cannot recover, upon the injunction bond, for timber sold, or for the use of the mortgaged premises, before the decree becomes absolute when the value of the unredeemed premises is greater than the mortgage debt.—*Hill v. Hill*, S. C. Vt., Jan. 12, 1887; 7 Atl. Rep. 468.

33. NEGLIGENCE—*Contributory—Railroad Crossing—Action for Damages—Directing Verdict for Defendant.*—A person in full possession of his sight and hearing, who crosses a railroad track at a street crossing with which he is well acquainted, on a dark and stormy night, without stopping to look or listen, and is killed by a train, is guilty of such contributory negligence as will defeat a recovery of damages for his death; and this, though the railroad company is guilty of negligence on its part in moving its train. In an action for damages for the death of a person killed at a railroad street

crossing, where the evidence clearly shows that deceased, being in full possession of his sight and hearing, attempted to cross defendant's track on a dark and stormy night, at a crossing with which he was well acquainted, without stopping to look or listen, the trial court should direct a verdict for defendant.—*Mynning v. Detroit, etc. R. Co.*, S. C. Mich., Jan. 6, 1887; 31 N. W. Rep. 147.

34. —— *Railroad Companies — Contributory — Boys Stealing Rides—Action—Damages for Boy's Death—Defense of Trespass.*— A boy, twelve years of age, who steals a ride upon a freight train, with or without the knowledge of the train men, and gets upon the front of an engine, where he is killed by a collision in which no one else is hurt, is guilty of contributory negligence, which will defeat a recovery of damages for his death. If permission is granted or implied by the action of men in charge of a train, in allowing boys to steal rides upon the train, the railroad company employing them cannot, in an action for damages for the death of such boys, rely upon the defense that they are trespassers.—*Ecliff v. Wabash, etc. R. Co.*, S. C. Mich., Jan. 13, 1887; 31 N. W. Rep. 180.

35. PARENT AND CHILD—*Accounting Made in Loco Parentis—Claim for Board and Clothing.*—Where plaintiff took defendant on the death of her mother, who was his sister, to live in his home "as a member of his family," where she continued her minority, and, after she came of age, to labor constantly, doing house-work and helping in farm-work, plaintiff cannot recover from her, or set off against a judgment against him for a balance due defendant from him, as administrator of her mother's estate, sums claimed to have been expended by him in board and clothes for defendant during and after her minority, his position being that of a parent while she was in his house. —*Starkie v. Perry*, S. C. Cal., Dec. 31, 1886; 12 Pac. Rep. 508.

36. PARTNERSHIP—*Advances Under Agreement to Become Partner.*—Where A advances money to B, to be used in his business, taking his notes therefor, under an agreement that A might become an equal partner with B, considering the sums advanced as contributions to the capital of the firm, if, on further examination, A should so desire, and B carries on the business as his own, drawing more than half the profits therefrom, and crediting A on the books with interest on the notes, and A, seeing the interest credited claims that he is a partner, and should receive half the profits, but no interest, and B still continues to credit A with interest, and to treat the business as entirely his own, in a suit on the notes the court is justified in ruling that no partnership was ever formed.—*Morrill v. Spurr*, S. J. C. Mass., Jan. 6, 1887; 9 N. E. Rep. 580.

37. PLEADING—*Action by Corporation — Averment of Incorporation—Presumption—Appeal—Amendment of Judgment Nunc Pro Tunc Pending Appeal.*—When an action is brought in a name appropriate for a corporation, or which may fairly import corporate character, *e. g.*, "The Thomas Harrow Company," and the capacity to sue is not put in issue, the capacity to sue, and corporate existence, if necessary, will be intended for the purposes of the suit, and, the incapacity to sue not appearing on the face of the complaint, it is not subject to demurrer founded on such objection, and will support a judgment by default on appeal. During the pendency of an appeal, a judgment may be amended *nunc pro tunc* in respect to proof of acknowledgment of service of process, and to the waiver of exemptions, at a subsequent term of the trial court, and, when properly certified to the appellate court, the amendment is before such court for consideration, and will relate back and sustain the judgment.—*Seymour v. Thomas Harrow Co.*, S. C. Ala., Jan. 13, 1887, 1 So. Rep. 45.

38. POWERS—*To Sell Land—By Implication—Executors.*—Where a testator divides his estate equally between his widow, son, and daughter, combines the entire property, real and personal, for the purposes of the division, and confides the whole to the control and management of his executor, who is to make no division, except as to the widow's share upon her request, until the daughter shall attain the age of twenty-fours, up to which time the son and daughter are to be educated and maintained, the executor, upon the daughter reaching that age, takes a power of sale, as to the land, by necessary implication. — *Hollman v. Tigges*, Ct. of Ch. N. J., Dec. 31, 1886; 7 Atl. Rep. 347.

39. RAILROAD COMPANIES—*Consolidation—Validity of Organization.*—After a railroad company has been merged by consolidation into another railroad company, and such new corporation is transacting and carrying on business, and in a *de facto* corporation, the existence of the corporation can only be attacked in a direct proceeding brought for that purpose; such a matter will not be inquired into collaterally.—*Chicago, etc. Co. v. Putnam*, S. C. Kans., Jan. 7, 1887; 12 Pac. Rep. 593.

40. SALE—*A Sale Under an Act of Congress will be Absolutely Void if Not in Accordance with the Granting Act.*—The mode and the time of sale, prescribed by a grant of lands by the United States in aid of the construction of a railroad, must be complied with in every essential particular, or the sale thereof will be void *ab initio* and *in toto*.—*Evans v. Miller*, S. C. Ala., Dec. Term, 1886.

41. —— *Contract—Rescission for Fraud—Replevin—Evidence—New Trial—Failure to Find Specially on Request—General Findings.*—In an action by a vendor to replevy goods which he has sold on credit, and to rescind the sale, on the ground of the fraudulent character of the purchase, it is competent for the plaintiff to introduce evidence of the subsequent acts, admissions, and dealings of the vendor which, although open to explanation, may tend to establish the fraud, and he is not restricted to evidence of the fraud and misrepresentations made by the vendee at or before the time of the sale. Where the trial court, upon request to make special findings of fact and law, makes only general findings and no finding of law, the appellate court cannot presume that no prejudice resulted, and the failure to find more specifically the facts and law is ground for reversal and a new trial.—*Ross v. Miner*, S. C. Mich., Jan. 13, 1887; 31 N. W. Rep. 185.

42. TELEGRAPH COMPANIES—*Bridge over Navigable River—Injunction — Condemnation Proceedings.*—Where a telegraph company presents an application to the judge of the district court, and

secures the appointment of commissioners to condemn a right of way for a telegraph line over and along a bridge which spans a navigable river, and therein specifically states the property proposed to be taken, and the particular manner by which it is proposed to attach the wires and other fixtures to the bridge, and it is found that the method outlined in the application will interfere with the opening of the draw span of the bridge, and obstruct the navigation of the river, the owner of the bridge is entitled to an injunction to restrain the company, and the commissioners that were appointed, from proceeding further under the application: and a proposal by the telegraph company, in its answer in the injunction proceeding, to so change its plan as to obviate the objections, and which is a substantial departure from the plan stated in the application, will not defeat the action for injunction. —*Pacific Mut. Tel. Co. v. Chicago, etc. Bridge Co.*, S. C. Kan., Jan. 7, 1887; 12 Pac. Rep. 560.

43. ——*Duty to Furnish Market Reports to Bucket Shops.*—A telegraph company is not bound, by its character as a common carrier, to furnish reports of the market prices of stocks and provisions to bucket shops, the business conducted in such shops being a species of gambling, even though it had contracted to furnish such reports.—*Smith v. Western Union Tel. Co.*, Ct. App. Ky., Jan. 6, 1887; 2 S. W. Rep. 483.

44. TRUSTS—*Family Settlement—Statute of Uses—Estate of Beneficiaries.*—A party, by deed, after marriage, conveyed certain land in trust, during the life of the grantor, for the support and maintenance of the grantor's wife and her issue, and upon the death of the grantor, if his wife survived him, and there should also be issue, then as to one moiety in trust for the sole and separate use of such wife for life, and as to the other moiety to the use of such issue and their heirs, forever. The deed also provided that, upon the joint request of the grantor and wife, or of the survivor, the said trustee should sell the whole or any part of the said property, and reinvest, etc. The grantor died, leaving his wife, and two children by said wife. *Held*, in an action for partition brought by a purchaser of the interest of one of the children under an execution sale, that the moiety given to the issue vested in them immediately upon the grantor's death, under the statute of uses, discharged from the trust, and the operation of the statute was not delayed by the provision in the trust for the sale of the whole or any part of the property on the joint request of the grantor and his wife, or of the survivor of them; the trust being extended thereby only as to the moiety given for life to the widow.—*Wieters v. Timmons*, S. C. S. Car., Nov. 22, 1886; 1 S. E. Rep. 1.

45. VENDOR AND VENDEE—*Agreement "to Clear Title"—Tax Title—Evidence to Explain Writing—Promise to Procure Deed.*—A purchased certain lands of B and, B having only a tax title to part of them, A refused to accept the title, and B thereupon entered into a written agreement to "clear the title to the premises." *Held*, in an action by B to recover the balance of the purchase money, that, unless A could show that the tax title was imperfect, B was entitled to recover. In such action parol evidence that the plaintiff intended to bind himself to procure a deed from the holder of the patent title is not admissible in explanation of the written agreement, as it would add a distinct obligation not contained in it.—*Kramer v. Richie*, S. C. Iowa, Dec. 22, 1886; 31 N. W. Rep. 90.

46. WATERS AND WATER-COURSES—*Common Reservoir — Repairs — Contribution—Abandonment—Delay—Damage—Injunction—Facts not Warranting—Obedience.*—Where one owns a dam and pond, and another a right to draw water therefrom, there being no contract to maintain the dam, either may abandon the power and free himself from its maintenance. But either has the right to maintain the power, and to have the other, till such abandonment, contribute his share of the expense. Equity will compel such contribution, and, on refusal thereof, will enjoin the party refusing from using the power. One such owner cannot recover from the other damages caused by unnecessary delay in repairing the dam. Upon facts detailed in statement of case and opinion, it was held that the orator was not entitled to the injunction obtained by him. One procuring an injunction cannot recover for damages caused him by the other party's rightful obedience to it.—*Webb v. Laird*, S. C. Ver., Jan. 12, 1887; 7 Atl. 465.

47. WILL—*Mental Capacity—Forgetting Names of Relatives—Busines Capacity.*—Mere inabillity to remember the names of relatives not immediately around a testatrix, and a want of sound business capacity, will not render her incapable of making a will.—*Kramer v. Weinert*, S. C. Ala., Jan. 6, 1887; 1 S. Rep. 26.

48. —— *In Payment of Mortgage.* — A residuary clause in the will of a mortgagor, who, subsequently to the execution of mortgage, had married the mortgagee, giving her a life interest in the income from the estate, and providing that the gift should be in lieu of dower, and of any other right to which she might be entitled by law in the estate, real and personal, is not to be construed as a payment of the mortgage, when the will directs that the testator's debts be paid, and makes provisions to that effect.—*Russell v. Minton*, Ct. of Chan. N. J., Dec. 31, 1886; 7 Atl. Rep. 342.

49. —— *Remainder — Children — Grandchildren.*—A limitation in a will to children of testator's children creates a vested remainder which opens and lets in those born after testator's death; and the inartificial use of the word "revert" does not obscure the plain meaning that the children are to take as purchasers. Under such a limitation the testator's grandchildren take per capita, as the whole fund goes over together, and because the remainder is evidently given in the same proportions as the remainder after the wife's death, which is limitied by the same clause, and in which the remaindermen's parents take no interest.—*Dole v. Keyes*, S. J. C. Mass., Jan. 6, 1887; 3 N. Eng. Rep. 327.

50. —— *Words of Limitation or Condition—Restraint of Marriage—Intention of Testator.*—A devise of land by a husband to his wife, so long as she remains his widow, is not upon a conditon in restraint of marriage; the words used being words of limitation, marking the duration of the estate, and not words of condition. The lawful intention of a testator, as manifested in his will, should be given effect by the courts.—*Summit v. Yount*, S. C., Ind., Dec. 21, 1886; 9 N. E. Rep. 582.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

Query No. 7.—The code of Iowa, § 4715, provides when any woman residing in any county of this State is delivered of a bastard child, or is pregnant with a child which, if born alive, will be a bastard, complaint may be made in writing by any person to the district county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceedings shall be in the name of the State of Iowa against the accused as defendant. Section 2529 provides: The following actions may be brought within the times herein limited respectively after their causes accrue, and not afterward except when otherwise specially declared: 1. Actions founded on injuries to person or reputation, whether found on contract on tort, or for a statute penalty within two years. 4. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect within five years. When does the statute of limitations commence to run, and when is an action barred by the statute. Will some one answer and cite authorities.

Query No. 8. A company is duly incorporated under the Iowa laws, and the capital stock is assessable in sums of ten per cent. on face value, and due and payable at the end of sixty days' notice through the mail to the owner. Should the owner fail to pay the assessment within twenty days after the expiration of said notice, the board, at its option, may send notice by mail of the *time and place* his stock shall be forfeited (not as liquidated damages) for non-payment of assessment, which notice shall be ten full days; and he may appear at such *time and place*, and show cause, if any, why the same should not be done. The board do all of these things, the owner fails to appear, and they pass a resolution forfeiting his stock. Will such an act stick, and what are the rights of the owner of the stock? Has the owner a right for paid-up stock to the amount of his payment, or are all his rights and privileges totally cut off thereby? Cite cases.

Des Moines, Iowa. AN OLD SUBSCRIBER.

QUERIES ANSWERED.

Query No. 18 [23 Cent. L. J. 191).—1. Has an Indiana Turnpike Company the right to prohibit the passage upon its roads of a steam traction engine used for threshing purposes, the conductor of the engine offering to pay all reasonable toll? 2. If it has, and no such prohibition is made, and the engine is injured while passing over the road, by reason of a defect in the bridge not known to the conductor of the engine, is the turnpike company liable for damages to the engine? Cite authorities, if any. E. B. S.

Answer.—Improved methods of locomotion cannot be excluded from existing public roads, if not inconsistent with the present methods. This rule is applied in the case of an engine used for threshing, which was being propelled by its own power along a public road. Macomber v. Nichols, 34 Mich. 212. We find no Indiana case on the subject. The corporation is responsible for those injured by their bridges being out of repair. They are bound to provide for such travel as may be expected, and such machines are no longer a novelty. Bd. of Comrs. v. Emmerson, 95 Ind. 579; Patton v. Bd. of Comrs., 96 Ind. 131.

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JETSAM AND FLOTSAM.

"LAUGHTER HOLDING BOTH HIS SIDES."—The staff of the Albany *Law Journal* is equipped with a funny man of extraordinary abilities. In the last number of that journal, February 12, 1887, appears the following: "Our amusing case this week is Brennan v. City of St. Louis, Missouri Supreme Court, December 20, 1886." The facts of the "amusing case" are then stated thus: "There was a ditch across a street. The plaintiff, a child three years old, was with her sister, thirteen years old, who was pushing a baby carriage with a baby in it, and were all on the sidewalk close to the ditch, when another little girl came up, stumbled against the plaintiff, and both fell into the ditch, and the plaintiff's leg was broken." The report proceeds: "The first contention is that plaintiff should have been non-suited," etc. This is indeed amusing, in fact absolutely excruciating. The mighty magic which can find the material of mirth in the broken leg of a little girl three years old, is worthy of the philosophers whom Swift represents as diligently striving to extract sunbeams from cucumbers.